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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 690

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ALFRED N. SEVERIN, DECEASED, AND AS SUCH AUTHORIZED LIQUIDATOR OF THE BUSINESS OF NILS P. SEVERIN AND ALFRED N. SEVERIN, BOTH DECEASED, FORMERLY COPARTNERS DOING BUSINESS UNDER THE STYLE OF N. P. SEVERIN COMPANY.

Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on January 8, 1952.

Opinion Below

The opinion of the United States Court of Claims (R. 118-124) is not yet officially reported.

Jurisdiction

The judgment of the United States Court of Claims was entered on January 8, 1952 (R. 125). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

Question Presented

Whether, under a contract with the United States, a prime contractor may recover in behalf of his subcontractor losses incurred by the latter as a result of the Government's breach of contract where the prime contractor has not reimbursed the subcontractor for such losses and is not liable for such losses under the subcontract but has agreed to pay the subcontractor such damages as may be recovered in his behalf.

Contract Provisions Involved

The prime contract with the United States is in the standard form of Government construction contract (R. 89-90, R. 111-112).

The subcontract contained the following provision (R. 110):

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages.

Statement

This litigation grows out of the performance of a contract for the building of a housing project for the Government. The contractor was a partnership and petitioner

is the legal representative of the partners, both of whom are deceased. The contract included the construction of 42 apartment buildings and a central heating plant consisting of a boiler house and stack (R. 80-81).

The excavation and grading work was subcontracted to W. J. Redmond and A. J. Collier, the subcontract containing the following provision:

> 23rd. The contractor or subcontractor shall not in any event be held responsible for any loss, damage, detention or delay caused by the owner or any other subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of contractor or subcontractor, or in any event for consequential damages (R. 109-110).

Respondent caused several delays in the performance of the contract work, the principal delay being in connection with the boiler house and stack. On October 17, 1935, respondent directed the contractor to cease work on the boiler house until a redesign of this building was prepared, and followed this with a written stop order on October 23, 1935. No work could be performed on the boiler house or stack until April 15, 1936, 175 days later, when respondent finally directed the prime contractor to proceed with the work in accordance with revised drawings (R. 102-104). It was not reasonable for respondent to take more than 40 days in redesigning the boiler house (R. 108). The United States Court of Claims held that taking 175 days to redesign the boiler house was a breach of contract, that not more than 40 days was a reasonable time for the redesign, and awarded the prime contractor damages in the sum of $28,051.65 based upon 135 days of unreasonable

delay attributable to respondent in connection with the redesign of the boiler house (R. 121).[1]

The subcontractor, Redmond and Collier, was delayed approximately 182 calendar days for the period that the changes in the boiler house and stack foundation were under consideration from October 17, 1935 to April 15, 1936, and incurred increased costs for such 182 days at the rate of $133.66 per day. They demanded payment of their increased costs from the prime contractor who did not pay them. The petitioner has agreed that any amount recovered in this suit because of the subcontractor's increased costs, less a proper amount for attorneys' fees and expenses, will be paid to the subcontractor (R. 110). The United States Court of Claims held that petitioner was not entitled to recover these increased costs in behalf of the subcontractor, a majority of the Court being of the opinion that respondent was not liable for such losses because the prime contractor in turn was not liable under the terms of the subcontract. Judge Madden and Judge Howell took a contrary view, relying on the decision of this Court in *United States* v. *Blair*, 321 U. S. 730, 737-738, (R. 122-123).

Specification of errors to be urged

The Court of Claims erred:

1. In holding that because the prime contractor was not liable under a subcontract to the subcontractor for losses incurred as a result of the Government's breach of the prime contract, petitioner could not recover such losses in behalf of the subcontractor.

2. In failing to hold, in accordance with *United States* v. *Blair*, 321 U. S. 730, 737-738, that petitioner could re-

[1] The United States Court of Claims also allowed recovery on certain other claims not pertinent to this petition which brought the total recovery awarded by that Court to $41,706.40 (R. 118-124).

cover in behalf of the subcontractor, losses incurred by the subcontractor as a result of the Government's breach of the prime contract whether or not petitioner was liable to the subcontractor for such losses under the terms of the subcontract.

3. In failing to give judgment to the petitioner, in behalf of the subcontractor, Redmond and Collier, for the losses incurred by said subcontractor as a result of respondent's breach of the prime contract.

Reasons for Granting the Writ

1. The decision of the Court below is in conflict with the decision of this Court in *United States* v. *Blair,* 321 U.S. 730, 737-738. There, the Government superintendent wrongfully required the subcontractor for tile and marble work to employ skilled labor instead of semi-skilled labor for certain parts of this work, thereby increasing the subcontractor's costs. This Court permitted the prime contractor to recover the increased costs incurred by the subcontractor as a result of the Government's breach of contract, stating that the prime contractor was the only person legally bound to perform his contract with the Government, that he was entitled to recover from the Government the contract price for the tile and marble work whether that work was performed by himself or his subcontractor, and that this necessarily implied the right to recover extra costs wrongfully demanded by the Government whether such costs were performed by the prime contractor or the subcontractor. Nowhere does the opinion suggest that the prime contractor had to prove liability by himself to the subcontractor in order to recover such losses. On the contrary, this Court permitted recovery despite the fact, as stated in the opinion, that the Court below made no finding, and the subcontract did not expressly indicate, that the prime con-

tractor was liable to the subcontractor for the Government's wrongful acts.

Since, from the *Blair* decision it is clear that the prime contractor need not prove liability to his subcontractor in order to recover damages incurred by the latter as a result of the Government's breach of the prime contract, the decision of the majority of the Court below denying recovery in the present case because there was no such liability, is in conflict with the Blair decision.

Moreover, there is nothing in the language of the subcontract provision involved in this case which purports to release the Government from liability for losses it may cause the subcontractor, or to release the prime contractor from its obligation to present to the Government claims for such loss on behalf of the subcontractor. Here the prime contractor has clearly recognized such obligation by suing the Government for the losses it caused the subcontractor and by agreeing to pay to the subcontractor any amount recovered in its behalf. Indeed, to have refused to prosecute the claim for the subcontractor's losses might well have rendered the prime contractor liable to the subcontractor.

2. In any event, the decision of this Court in the *Blair* case, *supra,* followed shortly by the denial of certiorari in *Severin* v. *United States,* 322 U.S. 733, has given rise to uncertainty on the part of the Court below which should be resolved by this Court. In the *Severin* case the Court of Claims, on May 3, 1943, held that a prime contractor, because of a subcontract provision identical with that in the present case, was barred from recovering damages in behalf of his subcontractor for delay caused by the Government. 99 C. Cls. 435, 443-444. The prime contractor filed a petition for certiorari shortly after the petition for certiorari was filed in the *Blair* case, *supra.* No action was taken by this Court in the *Severin* case until May 1, 1944, when it denied certiorari three weeks after its decision

in the *Blair* case, *supra*. Since that date the Court of Claims, or at least a majority of that Court, appear to have treated the denial of certiorari in the *Severin* case as an approval of that Court's decision, and have refused to allow recovery of damages in behalf of a subcontractor where the subcontract contained a provision similar to that involved in the *Severin* case. *James Stewart & Co.* v. *United States*, 105 C. Cls. 284, 331; *Continental Illinois National Bank, et al.* v. *United States*, 112 C. Cls. 563; *Pearson, Dickerson, Inc., et al.* v. *United States*, 115 C. Cls. 236, 264. Significantly, Judge Madden, who wrote the opinion for the majority in the *Severin* case, now expresses the opinion that those decisions are contrary to the decision of this Court in the *Blair* case and should be overruled. He has been joined in this view by Judge Howell. See R. 125-126. See also *Continental Illinois National Bank, et al.* v. *United States*, 112 C. Cls. 563, 567-569.

The denial of certiorari in the *Severin* case, *supra*, should not be taken as approval of the Court of Claims decision in that case. It has long been established that denial of certiorari is not the equivalent of affirmance of the decision of the court below, and involves no expression on the merits of the case. *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258; *United States* v. *Carver*, 260 U.S. 482, 490. Since this Court had just decided the *Blair* case, *supra*, it may well have believed that it had settled the rule regarding the Government's liability for a subcontractor's losses and that there was no occasion to reiterate it in the *Severin* case. Since that time, as shown above, the Court of Claims has shown uncertainty as to the effect of the rule laid down in the *Blair* case. Petitioner therefore submits that this uncertainty should be resolved.

3. The question presented is one of considerable public importance. Much work covered by Government contract is subcontracted. The subcontract provision involved in

the present case is not uncommon. In addition the rule implicit in the decision below that damages cannot be recovered against the Government without in turn establishing liability by the prime contractor to the subcontractor is one that potentially affects every subcontract under a Government contract.

4. Such a rule is unworkable and unjust. No prime contractor is going to admit liability to his subcontractor in a suit against the Government and take the risk that if unsuccessful his admission may be used against him in an action by the subcontractor. Thus the Government would be permitted to violate its contracts but escape liability for its wrongful acts.

Had the grading and excavation work been performed by the prime contractor there is no doubt but that the Government would have been liable for the increased costs of that work resulting from its breach of contract. Likewise, it is clear that the Court of Claims would have permitted recovery of such costs in behalf of the subcontractor if the subcontract had not contained the clause in question. See dissenting opinion of Judge Madden in *Continental Illinois National Bank, et al.* v. *United States,* 112 C. Cls. 563, 568. It is only equitable that in the present case the Government should also be held liable for the same losses resulting from the same breach as in the two preceding situations. To hold otherwise is to make the Government's liability dependent upon the accidental factor of the presence or absence of a subcontract provision rather than upon the natural consequences of the Government's breach.

Conclusion

It is respectfully submitted, for the reasons stated above, that this petition for a writ of certiorari should be granted.

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Attorneys for Petitioner.

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